



Discovery for Board Practitioners

Richard W. Vitaris
Administrative Judge

Time Line (approximate)

- 0 Appeal Filed
- 20 Initial Request for Discovery
- 25 Agency File due
- 60 Prehearing Submissions
- 65 Prehearing Conference
- 90 Hearing
- 120 Last day for AJ to issue Initial Decision

Discovery Time Limits

Initial Discovery requests within 25 days
from date of Acknowledgment Order

Responses to Discovery Requests are due
within 20 days from date of request

Additional requests are due within 10 days
of the date of the prior response.

Discovery Time Limits

Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired.

Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion.

Impact of Second Discovery Request

0	Appeal Filed
20	Initial Request for Discovery
25	Agency File due
40	Response to Initial Discovery Request
50	Second discovery request due
60	Prehearing Submissions
65	Prehearing Conference
70	Response to second discovery request
90	Hearing
120	Last day for AJ to issue Initial Decision

Impact of Motion to Compel

0	Appeal Filed
20	Initial Request for Discovery
25	Agency File due
40	Response to Initial Discovery Request
50	Motion to Compel Filed
60	Response to Motion to Compel
60	Prehearing Submissions
65	Prehearing Conference
90	Hearing
120	Last day for AJ to issue Initial Decision

Use Case Suspensions

Board regulations allow the AJ to suspend case processing for 30 days upon the Joint Request of the Parties

Discovery Guidelines

- The Board's regulations "are intended to provide a simple method of discovery." 5 C.F.R. § 1201.71.
- These regulations "will be interpreted and applied so as to avoid delay and to facilitate adjudication. . . . 5 C.F.R. § 1201.71.

Discovery Guidelines

- Parties are expected to start and complete discovery “with a minimum of Board intervention.” 5 C.F.R. § 1201.71.
- Discovery on a party is far broader than discovery on a non-party.

Scope of Discovery

Discovery on a party is permitted for “information that appears reasonably calculated to lead to the discovery of admissible evidence.” 5 C.F.R. § 1201.72(a).

But on a non-party, discovery “is limited to information that appears directly material to the issues involved in the appeal.” 5 C.F.R. § 1201.72(b).

Discovery Guidelines

The AJ has broad discretion to control or limit discovery that is:

- Cumulative or duplicative
- The information can be obtained in some other way that is less burdensome or expensive
- The burden or expense exceeds the likely benefit

Limitations on Discovery

- 25 interrogatories (including discrete subparts)
- 10 depositions

The AJ can approve exceptions to these limits

There are no limits to Requests for Admission

Discovery tips

Keep your hands clean and act in “good faith.”

How:

- Construe the opposing party’s discovery request reasonably.
- Don’t make silly objections.

Act in Good Faith

- Give the opposing party what you know they are entitled to and object to the rest
- Don't every just "blow off" a discovery request
- AJs hate discovery disputes so always call the opposing party to discuss the issue before seeking AJ intervention

Discovery tips

- Don't tolerate a response that says:
 - Will be included in the agency file
 - Will be identified in the prehearing submission
- Seek to involve the AJ early when you have a “difficult” opposing party

Discovery tips

- Follow the regulations closely when filing motions to compel so the AJ cannot summarily deny it.
- Call to make sure the opposing party will show up when you schedule a deposition
- Check on AJ's availability when scheduling depositions with a “difficult” opposing party

Discovery tips

- Develop standard discovery requests to identify affirmative defenses and witnesses
- Draft requests for admission to attempt to get the appellant to admit to any many elements of the offense as possible
- Turn the proposal letter into a Request for Admissions

Discovery tips

- Compromise with the other side to reduce the cost of depositions
 - Depositions may be taken by any method agreed upon by the parties



Thanks for your attention,

Richard Vitaris
Administrative Judge

